

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
BRIEF**

77-2091

Original
with Proof
of Service

To be argued by
MARK C. RUTZICK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WIDELTO LEYVA,

Petitioner-Appellant,

-against-

SUPERINTENDENT, GREEN HAVEN CORRECTIONAL
FACILITY,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR
RESPONDENT-APPELLEE

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TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement.....	1
Additional Question Presented.....	2
Additional Statement of Facts.....	2
ARGUMENT	
PETITIONER'S FAILURE TO TAKE AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE DECISION OF THE NEW YORK COURT OF APPEALS UPHOLDING THE CONSTITUTIONALITY OF THE STATUTE CHALLENGED HEREIN CONSTITUTES A WAIVER SUFFICIENT TO BAR HABEAS CORPUS RELIEF.....	3
A. If Petitioner Had Taken An Appeal to the Supreme Court, He Necessarily Would Have Received A Final Federal Determination of His Federal Constitutional Claim.....	3
B. If Petitioner Had Taken His Appeal to the Supreme Court He Would Now Be Barred From Raising His Present Claim In A Habeas Corpus Proceeding.....	4
C. Petitioner's Failure to Appeal to the Supreme Court Constitutes a Waiver of His Present Claim.....	5
Conclusion.....	13

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Fay v. Noia</u> , 372 U.S. 391 (1963)	6,10,11
<u>Gates v. Henderson</u> , ____ F. 2d ____, 1976 Slip Ops. 5361 (2d Cir. August 19, 1977) (en banc)	13
<u>Hankerson v. North Carolina</u> , ____ U.S. ____, 45 U.S.L.W. 4717 (U.S. June 17, 1977)	7
<u>Hicks v. Miranda</u> , 422 U.S. 322 (1975)	3
<u>Ivan V. v. City of New York</u> , 407 U.S. 203 (1972) ..	7
<u>Kaufman v. United States</u> , 394 U.S. 217 (1969)	10
<u>Neil v. Biggers</u> , 409 U.S. 188 (1972)	4
<u>People v. Leyva</u> , 38 N Y 2d 160 (1975)	2,3,8
<u>United States ex rel. Radich v. Criminal Court of the City of New York</u> , 459 F. 2d 745 (2d Cir. 1972), cert. den. sub nom <u>Ross v. Radich</u> , 409 U.S. 1115 (1973)	4
<u>Wainwright v. Sykes</u> , ____ U.S. ____, 45 U.S.L.W. 4807 (U.S. June 23, 1977)	5,6,8,10, 11,12,13
<u>Federal Statutes</u>	
28 U.S.C. § 1257(2)	3
§ 2244(c)	4
<u>New York Statutes</u>	
N.Y. Penal Law § 220.25(1)	2,3,4,7,8,13
<u>Other Authorities</u>	
A. Amsterdam, Search, Seizure, and Section 2255: 112 U.Pa. L. Rev. 378 (1964)	11

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Preliminary Statement

This Supplemental Brief is submitted by the
respondent-appellee Superintendent, Green Haven Correctional
Facility with the permission of the Hon. Wilfred Feinberg,
U.S.C.J., sitting as Presiding Judge of a panel of this Court
on December 13, 1977, the scheduled date of argument of this

appeal. Due to the fact that the appellant's counsel failed to appear to argue the appeal, the case was taken off the calendar to be restored at a future date upon motion by the appellant. This brief is addressed solely to an issue raised in open Court by the Hon. Thomas Meskill, U.S.C.J., another member of the panel sitting December 13, 1977.

Additional Question Presented

Does the failure of a state prisoner to take an appeal of right to the Supreme Court of the United States from the decision of the New York Court of Appeals upholding a state statute against a claim of conflict with the Federal Constitution constitute a waiver sufficient to bar habeas corpus relief?

Additional Statement of Facts

The only additional fact not noted in the respondent's main brief is that following the decision by the New York Court of Appeals in People v. Leyva, 38 N Y 2d 160 (1975), upholding the constitutionality of N.Y. Penal Law § 220.25(1) against petitioner's claim of conflict with the Federal Constitution, petitioner did not take an appeal to the Supreme Court of the United States.

ARGUMENT

PETITIONER'S FAILURE TO TAKE AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE DECISION OF THE NEW YORK COURT OF APPEALS UPHOLDING THE CONSTITUTIONALITY OF THE STATUTE CHALLENGED HEREIN CONSTITUTES A WAIVER SUFFICIENT TO BAR HABEAS CORPUS RELIEF.

- A. If Petitioner Had Taken An Appeal to the Supreme Court, He Necessarily Would Have Received A Final Federal Determination of His Federal Constitutional Claim

Following the decision by the New York Court of Appeals affirming his conviction and upholding the constitutionality of § 220.25(1) against petitioner's claim of conflict with the Federal Constitution, People v. Leyva, *supra*, petitioner was entitled to automatic review of that decision by appeal to the Supreme Court of the United States under 28 U.S.C. § 1257(2). Unlike the Supreme Court's certiorari jurisdiction, which is discretionary, the Supreme Court would have "had no discretion to refuse adjudication of the case on its merits. . . ." Hicks v. Miranda, 422 U.S. 322, 344 (1975). Any disposition of the appeal, including either summary affirmance or summary dismissal for "want of a substantial federal question", would have been an adjudication by the Supreme Court of the merits of the very claim petitioner is now presenting in this habeas corpus proceeding. Id. at 344-45.

B. If Petitioner Had Taken His Appeal to the Supreme Court He Would Now Be Barred From Raising His Present Claim In A Habeas Corpus Proceeding

If petitioner had taken the appeal to the Supreme Court to which he was entitled, and had received the "actual adjudication" of the claim he now presents as to the constitutionality of § 220.25(1), to which he was also entitled, he would now be barred from relitigating the same claim in a habeas corpus proceeding. Congress has so provided in 28 U.S.C. § 2244(c), which "embodies a recognition that if [the Supreme] Court has 'actually adjudicated' a claim on direct appeal or certiorari, a state prisoner has had the federal redetermination to which he is entitled." Neil v. Biggers, 409 U.S. 188, 191 (1972). This statute was "[c]onsistent with the overall scheme of allowing the petitioner to obtain one federal determination" of his federal constitutional claims. United States ex rel. Radich v. Criminal Court of the City of New York, 459 F. 2d 745, 749 (2d Cir. 1972), cert. den. sub nom Ross v. Radich, 409 U.S. 1115 (1973) (emphasis supplied). This section provides in pertinent part:

"In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein. . . ."

Thus there can be no dispute that petitioner would not be able to come before this Court today seeking habeas corpus relief had he taken his appeal of right to the Supreme Court from the New York Court of Appeals in 1975. Had he taken that appeal he would have brought his criminal proceeding to a final conclusion long ago, and would not still be litigating his federal constitutional claims in 1978.

C. Petitioner's Failure to Appeal to the Supreme Court Constitutes a Waiver of His Present Claim

Last term, in Wainwright v. Sykes, ____ U.S. ____, 45 U.S.L.W. 4807 (U.S. June 23, 1977), the Supreme Court enunciated a new test to determine when a state prisoner's failure to raise an issue of federal constitutional law at his state trial would bar him from pursuing that claim in a

subsequent federal habeas corpus proceeding. The Court held that the prisoner would be barred from presenting that claim "absent a showing of cause for the non-compliance and some showing of actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, supra, 45 U.S.L.W. at 4811. The Court noted that this test was more restrictive upon the prisoner than the "deliberate bypass" test set forth in dicta in Fay v. Noia, 372 U.S. 391, 438 (1963) and expressly stated that "[i]t is the sweeping language of Fay v. Noia . . . which we today reject." Wainwright v. Sykes, supra, 45 U.S.L.W. at 4812.

The test of Wainwright v. Sykes, supra, applies to petitioner's failure to obtain a final federal determination of his present claim from the Supreme Court on direct appeal. The Supreme Court's analysis of its holding in Sykes applies with equal or greater force to this situation even though (indeed, because) it was a federal rather than state determination which petitioner waived.

One of the Court's major reasons for its broad waiver test in Sykes was the interest in "finality in criminal litigation." Sykes, supra, at 4812. That interest bears with equivalent strength upon any procedure available to the prisoner in his state litigation, including most certainly his direct appeal to the Supreme Court. Had petitioner taken that

appeal from the 1975 decision by the New York Court of Appeals his criminal litigation would have come to a complete and final conclusion long ago following the Supreme Court's disposition of the appeal. This proceeding would not be occurring today, with decision from this Court likely in 1978 and subsequent petition for certiorari likely from the losing party quite possibly extending into the Supreme Court's 1978-79 Term.

The State's interest in "finality of criminal litigation" in this case, however, extends far beyond petitioner himself. The constitutional challenge presented herein directly threatens the conviction of every prisoner in New York to whom § 220.25(1) was applied. If the statute is invalidated, a serious possibility exists that the Court's decision would apply retroactively. See Hankerson v. North Carolina, ____ U.S. ____, 45 U.S.L.W. 4717 (U.S. June 17, 1977); Ivan V. v. City of New York, 407 U.S. 203 (1972). In that case the delay in the determination of the constitutional issues raised herein -- due solely to petitioner's failure to take his appeal of right to the Supreme Court -- would put New York to enormous unnecessary expense in retrying as many as hundreds of prisoners convicted in cases involving § 220.25(1) in the period since the Supreme Court would have decided this issue on direct appeal.

Unquestionably prosecutors in New York were and are entitled to rely on the unanimous Court of Appeals decision in People v. Leyva, supra, upholding § 220.25(1). If a federal court is going to overrule that decision it should have been as soon as possible, not years later. In addition, as a matter of comity, it should be the Supreme Court, rather than this Court, which should properly overrule New York's highest court if such a ruling is to occur.

The Supreme Court in Sykes, supra, also identified as a major justification for its expanded waiver holding the interest in "making the state trial on the merits the 'main event', so to speak, rather than a tryout for what will later be the determinative federal habeas hearing." Sykes, supra at 4812. That interest, too, applies with great force to this situation, since petitioner could have made his trial not merely the main event but indeed his "only appearance", so to speak, by taking his direct appeal to the Supreme Court and obtaining a federal determination of all his federal constitutional claims in the direct appeal process, thereby obviating the need for a federal habeas corpus proceeding at all.

In this case there are also important federal interests which dictate a holding that petitioner is barred from habeas corpus relief. The first is the strong federal interest in avoiding forum-shopping by state prisoners between the Supreme Court on the one hand and the lower federal courts, where ultimate review by the Supreme Court through writ of certiorari is statistically very unlikely, on the other. One can easily imagine a state prisoner or his counsel carefully weighing the Supreme Court's most recent pronouncements in the areas analogous to the prisoner's possible federal claim, comparing those decisions to the holdings of the district and circuit where he is located (or was convicted), and choosing the court most likely to look upon his claim with favor. Virtually no other litigant anywhere in the federal system has that privilege (only the foreign dignitaries to whose cases the Constitution assigns concurrent original jurisdiction to the Supreme Court and the federal district court). Certainly it should not be encouraged since it promotes inconsistency and disharmony within the federal judiciary and tends to defeat the perception of the federal courts as a unified national system.

There is also a strong federal interest present in judicial economy. Direct appeal to the Supreme Court disposes of a federal claim in one federal court in one hearing. Habeas corpus review involves dispositions by the federal district court, the court of appeals and probably by the Supreme Court at least in considering if a writ of certiorari should be granted. Plenary Supreme Court review, if granted, requires a fourth round of papers and decisions. Surely this interest alone requires that a prisoner avail himself of one-step federal review or abandon his right to three- or four-step review.

The Supreme Court has recognized that many of the interests involved in state prisoners' habeas proceedings apply with equal force to federal prisoners' petitions under 28 U.S.C. § 2255 where the only interests involved are federal interests. See Kaufman v. United States, 394 U.S. 217 (1969). Indeed in the past the Court has imported into the § 2255 arena the "deliberate bypass" test of Fay v. Noia, supra, see Kaufman v. United States, supra at 220 n. 3, 227 n. 8. Now that the Court has abandoned that test for § 2254 petitioners, it is reasonable to conclude that the Court would also replace that test with the Sykes "cause" and "prejudice" test where only federal interests are at stake.

Here, where, as has been shown, both state and federal interests are implicated, the Sykes test surely must apply.

Indeed, there is much more reason to find a waiver in a state prisoner's failure to present his federal claim to the Supreme Court which would have to make a dispositive determination of that claim than in his failure to present that claim to a state court whose determination would never, in only event, be dispositive. As Professor Amsterdam put it, commenting subsequent to Fay v. Noia but prior to Wainwright v. Sykes:

" . . . Granted Mr. Noia does not lose the federal habeas corpus hearing, to which Brown v. Allen entitles him from the beginning, merely because he fails to press his federal claim before a state tribunal which in no case could dispose of it definitively against him. It does not follow that the federal accused who fails to present a timely and effective constitutional contention to a potentially dispositive federal forum thereby gains a second litigating opportunity which would not otherwise have been open to him."

A. Amsterdam, Search, Seizure and Section 2255: A Comment, 112 U.Pa.L. Rev. 378, 381 (1964).

What is true of Professor Amsterdam's federal prisoner is equally true of the state prisoner who, like petitioner, has assured access to a dispositive federal disposition on direct appeal.

It is clear that the petitioner in this case cannot meet the burden placed upon him by the "cause" and prejudice" standard of Wainwright v. Sykes, supra, and thus is barred from pursuing his present constitutional claim on habeas review. Petitioner's present counsel is the same counsel who represented him in his state appeals to the Appellate Division and the State Court of Appeals. Nowhere, has he ever suggested an explanation for his failure to appeal to the Supreme Court. It is true that this issue was not raised in this case prior to the present time, but the burden nonetheless rests upon the petitioner to demonstrate his right to habeas review by showing the "cause" required by Sykes. If petitioner has any explanation for this failure, he may still tender that explanation to the Court in a responsive brief or affidavit.

However if petitioner's explanation is merely one of negligence or inadvertence on the part of his appellate counsel, that explanation is not sufficient to establish the requisite "cause". See Wainwright v. Sykes, supra at 4816

(Brennan, J., dissenting); Gates v. Henders _____ F. 2d _____, 1976 Slip. Ops. 5361, 5386 and n. 6 (Oakes, J., concurring in the result) (2d Cir. August 19, 1977) (en banc).

Nor can petitioner demonstrate "actual prejudice" from the use of § 220.25(1) at his trial. Whether or not petitioner must simply show that the use of the presumption was not harmless error, or must show more than that, see Wainwright v. Sykes, supra, at 4814 (White, J., concurring in the judgment), the burden is clearly placed upon the petitioner to make the necessary showing. However, in this case the respondent has already demonstrated that the use of the presumption at petitioner's trial was in fact harmless error beyond a reasonable doubt. See Respondent's Brief at 29-31. That ends the inquiry.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
DENYING THE PETITION FOR A WRIT
OF HABEAS CORPUS SHOULD BE AFFIRMED.

Dated: New York, New York
December 23 , 1977

Respectfully submitted,

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STATE OF NEW YORK)
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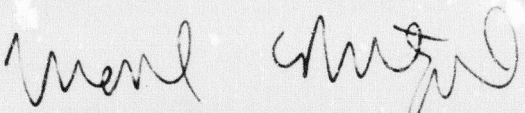
ROSALIN G. SMALLS , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellee
herein. On the 22nd day of December , 1977 , she
served the annexed upon the following named person :

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Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
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address within the State designated by him for that purpose.


ROSALIN G. SMALLS

Sworn to before me this
22nd day of December , 1977


Assistant Attorney General
of the State of New York